In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1080

BENRUS WATCH COMPANY, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

No. 1081

CLIFFORD SEIGMEISTER, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15–34) is reported at 352 F. 2d 313. The opinion of the Federal Trade Commission (Pet. 36–52) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1965 (Pet. 35). The petitions for

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writs of certiorari were filed on March 2, 1966. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission applied an erroneous standard in determining that petitioners' "preticketing" practice tended to deceive consumers.

2. Whether the Commission was justified in ordering petitioners to terminate practices which they had abandoned before the Commission proceeding was begun.

3. Whether the Commission gave petitioners adequate notice of a particular deceptive practice with which they were charged.

STATEMENT

Petitioners are corporations engaged in the manufacture of "Benrus" and "Belforte" watches and a number of their officers.[1] They were found by the Federal Trade Commission to have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by (1) "preticketing" their watches with fictitious retail prices and disseminating advertisements containing these prices; (2) falsely representing that consumers could realize savings on the purchase of the watches by trading in old watches or by bringing in "allowance certificates" which had been distributed;

[1] The petition in No. 1080 was filed by the corporations and nine individual officers. The petition in No. 1081 was filed by a former officer of Benrus Watch Company.

(3) representing that their watches were guaranteed without fully disclosing the conditions and limitations of the guarantee; (4) falsely representing that their watches are "shock proof" or "shock protected"; and (5) selling watches with cases of base metal "treated or processed" to look like precious metal, without disclosing the true metal content (R. 112–126).[2]

On the "preticketing" allegation, the Commission found that petitioners had attached tags to their watches purporting to show retail prices and had listed these "preticketed" prices in consumer advertising (R. 113), but that the prices actually charged by many retailers—"the generally prevailing retail prices"—for the watches were substantially less than the preticketed prices (R. 115–117). The Commission concluded that by ticketing their products at prices which were "not [their] regular and usual prices," petitioners engaged in a practice which had "the tendency of deceiving the public as to the savings afforded by the purchase of a product thus tagged, as well as to the value of the product acquired" (R. 117).

With regard to the charge that petitioners had failed to disclose the true metal content of watch cases processed to simulate precious metal, the Commission found that some of petitioners' watch cases were composed essentially of base metal upon which an extremely thin coating of gold (approximately .0008 of

[2] "R." refers to the printed joint appendix filed in the court of appeals.

an inch) had been applied, and that such coating was insubstantial and impermanent (R. 123–124). The Commission held that the sale of such watches without disclosure of the true metal content was deceptive (R. 122–125).

The Commission entered a cease-and-desist order (R. 132–134), which was affirmed unanimously by the court of appeals (Pet. App. 15–34).

ARGUMENT

1. There is no merit to petitioners' contention that the Commission applied erroneous standards in determining whether the "preticketing" practice had a tendency to deceive consumers. There was abundant evidence that petitioners' watches had been widely sold at lower prices than their tickets reflected, and this evidence supported the Commission's conclusion that the ticketed prices were not the "usual and regular retail prices" irrespective of the precise definition of those terms. The "usual and regular retail price" standard has been consistently applied by the Commission and approved by reviewing courts. See *Regina Corp.* v. *Federal Trade Commission,* 322 F. 2d 765 (C.A. 3); *Helbros Watch Co.* v. *Federal Trade Commission,* 310 F. 2d 868 (C.A. D.C.), certiorari denied, 372 U.S. 976; *Clinton Watch Co.* v. *Federal Trade Commission,* 291 F. 2d 838 (C.A. 7), certiorari denied, 368 U.S. 952.

Nor was the Commission required to hear evidence in this case regarding the common meaning ascribed by consumers to preticketed prices. In judging what

a representation means to consumers, the Commission may draw upon its experience with similar representations in previous cases. See *Zenith Radio Corp.* v. *Federal Trade Commission,* 143 F. 2d 29 (C.A. 7); *Doris Savitch,* 50 F.T.C. 828, affirmed, 218 F. 2d 817 (C.A. 2); *Bakers Franchise Corp.* v. *Federal Trade Commission,* 302 F. 2d 258 (C.A. 3). In earlier cases, often after receiving extensive consumer testimony,[3] the Commission had found that many consumers regard a preticketed price as the regular and usual retail price in the area, and that finding was relevant here.

In any event, petitioners were given the opportunity to demonstrate that in this case a different view of the meaning of the representations was appropriate. The Commission concluded that petitioners' evidence was not probative, and the court of appeals upheld the Commission's conclusion (Pet. App. 23).[4]

Nor is there merit in petitioners' contention (Pet. 9–11) that the Commission's revised Guides Against Deceptive Pricing, promulgated shortly after its decision in this case, repudiate the earlier view that consumers regard a preticketed price as the price at which the article is generally sold. The Guides explicitly state that "[m]any members of the purchasing public believe that a manufacturer's list price, or

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[3] See, *e.g., Giant Food, Inc.*, 61 F.T.C. 326, affirmed, 322 F. 2d 977 (C.A. D.C.).

[4] Viewed most favorably for petitioners, their own survey showed that a not insubstantial segment of the consuming public would be deceived by the preticketing (R. 116–117).

suggested retail price, is the price at which an article is generally sold."[5] And since the revised Guides made no change in the Commission's fundamental views regarding manufacturers' list and preticketed prices (*Revco D.S. Inc.*, F.T.C. Docket No. 8576, 3 Trade Reg. Rep. ¶ 17,287, at 22392–22393), it was not necessary for the Commission to reopen the instant proceeding after the Guides were issued.

The revised Guides recognize that a manufacturer selling throughout the nation "cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area"[5a]; the Commission has now stated that "it is enough if he ascertains the price at which substantial (that is, not isolated or insignificant) sales of the product are being made by principal retail outlets in representative communities." *John Surrey, Ltd.*, 3 Trade Reg. Rep. ¶ 17, 221, at 22290. The Commission might, to be sure, reexamine its decided cases in light of the slightly altered burden cast upon manufacturers by the revised Guides. But it has decided, as a matter of policy, that the "standards enunciated in the Guides are in-

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[5] 2 Trade Reg. Rep. ¶ 7897, at 12808.

[5a] The Guides state (2 Trade Reg. Rep. ¶ 7897, at 12809):

"On the other hand, a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (*i.e.*, as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice."

tended to be prospective, rather than retrospective, in their application." *Regina Corp.*, F.T.C. Docket No. 8323, Trade Reg. Rep. (1963–65 Transfer Binder) ¶ 16,863. The court of appeals properly concluded that the Commission had acted reasonably in applying the revised Guides only to cases decided subsequent to their promulgation.[6] That conclusion does not warrant further review by this Court.

2. Petitioners also contend (Pet. 12) that the Commission should not have entered a cease-and-desist order against deceptive guarantee practices which were abandoned prior to the issuance of the Commission's complaint. It is well settled, however, that abandonment of a practice, whether before the Commission's complaint or after, does not moot the controversy. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260. The question whether entry of an order is appropriate when a practice has been abandoned is for the Commission's discretion. *Giant Food Inc.* v. *Federal Trade Commission*, 322 F. 2d 977 (C.A. D.C.); *New Standard Publishing Co.* v. *Federal Trade Commission*, 194 F. 2d 181 (C.A. 4); *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (C.A. 7). The Commission has announced its policy to deal with abandoned practices only when entry of an order may be necessary "to prevent the recurrence of unlawful conduct."

[6] In *Majestic Electric Supply Co.*, F.T.C. Docket No. 8449, Trade Reg. Rep. (1963–65 Transfer Binder) ¶ 16,825, relied upon by petitioners (Pet. 11), the Commission had not yet rendered a decision and it therefore considered the case in the light of the revised Guides.

Revco D.S. Inc., 3 Trade Reg. Rep. ¶ 17,287, at 22397–22398. On the record in this case, including the other instances of misrepresentation by petitioners in the merchandising of their watches, the court of appeals properly concluded (Pet. App. 28) that the Commission had not abused its discretion.

3. There is no substance to petitioners' final contention that the Commission, "contrary to fundamental standards of fairness," held them accountable for a violation of the Act not alleged in the complaint (Pet. 12). Paragraph 10 of the Commission's complaint alleged that petitioners had sold watches having base-metal bezels treated or processed to simulate gold without disclosing their true metal content. The Commission found this charge to be sustained upon a showing that the bezels in question were base metal electroplated with an extremely thin and insubstantial layer of gold—approximately eight ten thousandths (.0008) of an inch in thickness. The Commission found that such a coating gives the temporary and deceptive appearance of solid gold or gold plate, so that the watch case should be labeled as "base metal" in order to avoid deceiving consumers. This view is set forth in the Commission's Trade Practice Conference Rules for the Watch Case Industry, 16 C.F.R. 174.2(9), which were adopted in 1948. And long before the time when petitioners put on their defense, Commission staff counsel announced their theory under paragraph 10 of the complaint, explaining why the watch cases should be regarded as "base metal" despite the

gold coating (R. 22–23). On these facts, petitioners had sufficient notice of the Commission's charge against them and full opportunity to make their defense. There was no reason to confine the Commission to the very literal reading of the complaint which petitioners now urge.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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